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Lifeforce and Local 881, United Food and Commercial Workers. Case 13–CA–091617

June 5, 2015

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA
AND MCFERRAN

This is a refusal-to-bargain case in which the Respondent is contesting the Union’s certification as bargaining representative in the underlying representation proceeding. Pursuant to a charge filed by Local 881, United Food and Commercial Workers (the Union) on October 18, 2012, the Acting General Counsel issued the complaint on November 1, 2012, alleging that Lifeforce (the Respondent) has violated Section 8(a)(5) and (1) of the Act by refusing the Union’s request to recognize and bargain following the Union’s certification in Case 13–RC–074795. (Official notice is taken of the record in the representation proceeding as defined in the Board’s Rules and Regulations, Secs. 102.68 and 102.69(g). *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer admitting in part and denying in part the allegations in the complaint, and asserting affirmative defenses.

On November 26, 2012, the Acting General Counsel filed a Motion for Summary Judgment. On November 27, 2012, the Acting General Counsel filed a correction to that motion. On November 28, 2012, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response.

On December 21, 2012, the National Labor Relations Board issued a Decision and Order in this proceeding, which is reported at 359 NLRB No. 45 (2012). Thereafter, the Respondent filed a petition for review in the United States Court of Appeals for the Seventh Circuit, and the General Counsel filed a cross-application for enforcement.

At the time of the Decision and Order, the composition of the Board included two persons whose appointments to the Board had been challenged as constitutionally infirm. On June 26, 2014, the United States Supreme Court issued its decision in *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014), holding that the challenged appointments to the Board were not valid. Thereafter, the court of appeals remanded this case for further proceedings consistent with the Supreme Court’s decision.

On December 16, 2014, the Board issued a further Decision, Certification of Representative, and Notice to Show Cause in Cases 13–CA–091617 and 13–RC–074795, which is reported at 361 NLRB No. 136. Thereafter, the General Counsel filed a first amended complaint in Case 13–CA–091617, the Respondent filed an answer to the amended complaint, the General Counsel filed a response to the notice to show cause, and the Respondent filed a response to the notice to show cause and a statement in opposition to the Motion for Summary Judgment.¹

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

The Respondent admits its refusal to bargain, but contests the validity of the certification on the basis of its objections to conduct alleged to have affected the results of the election in the representation proceeding.

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941).

As noted above, the Respondent also argues for the first time that the Regional Director was invalidly appointed and without authority to act in this matter. In its statement in opposition to the Motion for Summary Judgment, the Respondent makes clear that its challenge to the authority of the Regional Director is based on its argument that Member Becker was not validly appointed and, therefore, the Board lacked a quorum on December 13, 2011, when the Regional Director was appointed. We reject this argument. First, since the Respondent did not raise this issue previously, we find that the Respondent is estopped from challenging the authority of the Regional Director at this time. See *Professional Transpor-*

¹ The amended complaint substitutes “December 16, 2014” for “September 19, 2012” as the date the Board certified the Union as the exclusive collective-bargaining representative of the unit employees, alleges that the Union’s request that the Respondent recognize and bargain collectively with it has continued to date, and alleges that the Respondent continues to fail and refuse to recognize and bargain with the Union. The amended answer admits the factual allegations of the complaint, reiterates the arguments made in the underlying representation proceeding that the Union was not properly certified, and argues for the first time that the Regional Director was without legal authority to act in this matter.

tation, 362 NLRB No. 60, slip op. at 2 fn. 7 (2015). Moreover, the Respondent is simply wrong that the Board lacked a quorum at the time the Regional Director was appointed. Member Becker's appointment is not subject to challenge under the Supreme Court's decision in *Noel Canning*, supra, and the Board unquestionably had a quorum when the Regional Director was appointed. See *NLRB v. Gestamp South Carolina, LLC*, 769 F.3d 254, 257 (4th Cir. 2014) ("we now hold that Member Becker was validly appointed to the Board.").

Accordingly, we grant the Motion for Summary Judgment.²

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a not-for-profit corporation with an office and place of business in Rosemont, Illinois, has been engaged in the business of providing services related to whole and processed blood products.

During the past calendar year, a representative period, the Respondent, in conducting its business operations described above, purchased and received at its Rosemont, Illinois facility goods, products, materials, and services valued in excess of \$50,000 directly from points outside the State of Illinois.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union, Local 881, United Food and Commercial Workers, is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Certification*

Following the representation election held on March 30, 2012, the Union was certified on December 16, 2014, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All full-time and regular part-time Account Managers and Team Account Managers in the Recruitment department employed by the Employer at its facility located at 5505 Pearl Street, Rosemont, Illinois; but excluding all other employees, office clerical employees and guards, professional employees and supervisors as defined in the Act.

² The Respondent's request that the complaint be dismissed is therefore denied.

The Union continues to be the exclusive collective-bargaining representative of the unit employees under Section 9(a) of the Act.

B. *Refusal to Bargain*

At all material times, Diane Merkt has held the position of vice president of administration and chief compliance officer and has been a supervisor of the Respondent within the meaning of Section 2(11) of the Act and an agent of the Respondent within the meaning of Section 2(13) of the Act.

Since about October 3, 2012, and continuing to date, the Union, by Jeff Jayko, has requested that the Respondent meet to bargain collectively with it as the exclusive collective-bargaining representative of the unit. Since about October 15, 2012, and continuing to date, the Respondent has refused to recognize and bargain with the Union. We find that this refusal constitutes an unlawful refusal to recognize and bargain with the Union in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By failing and refusing to recognize and bargain with the Union as the exclusive collective-bargaining representative of the employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.³

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided

³ In *Howard Plating Industries*, 230 NLRB 178, 179 (1977), the Board stated:

Although an employer's obligation to bargain is established as of the date of an election in which a majority of unit employees vote for union representation, the Board has never held that a simple refusal to initiate collective-bargaining negotiations pending final Board resolution of timely filed objections to the election is a *per se* violation of Section 8(a)(5) and (1). There must be additional evidence, drawn from the employer's whole course of conduct, which proves that the refusal was made as part of a bad-faith effort by the employer to avoid its bargaining obligation.

No party has raised this issue, and we find it unnecessary to decide in this case whether the unfair labor practice began on the date of the Respondent's initial refusal to bargain at the request of the Union, or at some point later in time. It is undisputed that the Respondent has continued to refuse to bargain since the Union's certification and we find that continuing refusal to be unlawful. Regardless of the exact date on which Respondent's admitted refusal to bargain became unlawful, the remedy is the same.

by law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); accord *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), *enfd.* 350 F.2d 57 (10th Cir. 1965); *Lamar Hotel*, 140 NLRB 226, 229 (1962), *enfd.* 328 F.2d 600 (5th Cir. 1964), *cert. denied* 379 U.S. 817 (1964).

ORDER

The National Labor Relations Board orders that the Respondent, Lifesource, Rosemont, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with Local 881, United Food and Commercial Workers, as the exclusive collective-bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All full-time and regular part-time Account Managers and Team Account Managers in the Recruitment department employed by the Employer at its facility located at 5505 Pearl Street, Rosemont, Illinois; but excluding all other employees, office clerical employees and guards, professional employees and supervisors as defined in the Act.

(b) Within 14 days after service by the Region, post at its facility in Rosemont, Illinois, copies of the attached notice marked "Appendix."⁴ Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site,

⁴ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 15, 2012.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. June 5, 2015

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to recognize and bargain with Local 881, United Food and Commercial Workers

as the exclusive collective-bargaining representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the following bargaining unit:

All full-time and regular part-time Account Managers and Team Account Managers in the Recruitment department employed by us at our facility located at 5505 Pearl Street, Rosemont, Illinois; but excluding all other employees, office clerical employees and guards, professional employees and supervisors as defined in the Act.

LIFESOURCE

The Board's decision can be found at www.nlrb.gov/case/13-CA-091617 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

